Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1526

J. C. RAMSEY, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Filed March 10, 1980

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Rules

Federal Rules of Criminal Procedure, Rule 41 3

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming Petitioner's conviction, entered in the above entitled cause on December 17, 1979, for which a Petition for Rehearing was denied on March 10, 1980.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit, not yet reported, appears in Appendix A hereto. [1/] No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered December 17, 1979. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 USC §1254(1).

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[1] The order denying the petition for rehearing and rejecting the suggestion for rehearing en banc appears in Appendix B hereto.

QUESTION PRESENTED

Whether the trial court erred in not requiring the Government to demonstrate the absence of taint as to certain challenged evidence, once the Court ruled that the seizure from which that evidence flowed was unconstitutional, and the Petitioner demonstrated taint with specific evidence, in clear violation of this Court's ruling in Nardone [2] and Alderman.[3]

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[2] Nardone v. United States, 308 U.S. 338; 60 S.Ct. 266 (1939).

[3] Alderman v. United States, 394 U.S. 165; 89 S.Ct. 961 (1969).

STATEMENT OF THE CASE

Petitioner J.C. RAMSEY was named in a two count (superseding) indictment filed on April 27, 1977, charging him in Count I with conspiracy to distribute and possess with intent to distribute Schedule One narcotic drug controlled substances (heroin), in violation of Sections 812, 841(a)(1), and 841(b)(1)(A) of Title 21, United States Code. Count II charged Petitioner and others with the substantive crime of distribution.

Prompted by a Rule 41, Federal Rules of Criminal Procedure, motion, the issue of the legality of the search and seizure was litigated prior to trial. On October 28, 1977, after a two day hearing, the Court held the search and seizure to have been illegal on multiple grounds.

Thereafter, counsel for RAMSEY raised a "fruit of the poisoned tree" problem with respect to two areas of evidence that the Government proposed to offer at trial. One was a California Driver's License, which the

Government promptly subpenaed after the first Driver's License was suppressed by the trial court, and the other were certain telephonic records and other evidence regarding an address on Collins Avenue where RAMSEY was alleged to have resided. Although defense counsel requested that the Government establish, by independent evidence, that the source of the license and address were independent from the initial illegality [RT 9], the Court ruled the evidence admissible, relying on the mere representations of Government counsel, not subject to cross-examination, that an independent source existed. [RT 10]

Immediately thereafter, a court trial was held, in which the challenged evidence was received, and Petitioner was found guilty on both counts. A judgment of conviction was entered on January 3, 1978, sentencing Petitioner to serve concurrent sentences of seven years on each of two counts, with eligibility for parole pursuant to 18 USC §4205(b)(2);

and, pursuant to 21 USC §841(b)(1)(A), an additional special parole term of three years. Petitioner's bond on appeal was continued.

REASONS FOR GRANTING THE WRIT

I

THE PRIMARY ILLEGALITY HAVING BEEN ESTABLISHED BY VIRTUE OF THE HOLDING THAT THE SEIZURE FROM WHICH THE CHALLENGED EVIDENCE FLOWED WAS UNCONSTITUTIONAL, AND THE PETITIONER OFFERING SPECIFIC EVIDENCE DEMONSTRATING TAINT, THE TRIAL COURT ERRED IN NOT REQUIRING THE GOVERNMENT TO DEMONSTRATE, BY INDEPENDENT EVIDENCE, THAT THE PROFFERED EVIDENCE WAS SUFFICIENTLY ATTENUATED AS REQUIRED BY ALDERMAN AND NARDONE, SUPRA.

A. The Court of Appeals Misapprehended Both the Facts and the Law in Affirming the Conviction.

In ruling on Petitioner's appeal from the judgment of conviction, the Ninth Circuit Court of Appeals misapprehended both the facts of the record below and the law to be applied in determining whether proffered evidence, claimed by Petitioner to have been tainted by the illegality of the primary seizure, is sufficiently attenuated from the illegality to be

admissible.

In affirming Petitioner's conviction the Court of Appeals held:

> "In response to inquiries by the district court, the Assistant U.S. Attorney stated that the license was obtained through normal investigative techniques and that all information necessary to subpoena it was known prior to the illegal search and seizure. Therefore, we hold that the license was not suppressible as 'fruit of the poisonous tree.'[5/]" Appendix A, pp.7-8. (Emphasis added.)

Footnote 5 of that opinion clearly reflects that the Court of Appeals misapprehended the state of facts in the record below. The court stated:

> "Ramsey now questions the district court's failure to hold a hearing on the issue of independent source. However, he requested no hearing below, and the Government's representations that the source was independent were never even questioned." Appendix A, p. 8, fn.5.

In fact, at the commencement of the trial, counsel for Petitioner raised the problem of taint, and clearly set forth the Petitioner's position that the Government must prove the absence

of that taint at a hearing by presenting evidence, not mere representations of counsel. [RT 3-9]

The record below clearly demonstrates that the foregoing portion of the court's decision is demonstrably wrong in two respects. First, counsel below was clearly requesting an opportunity to examine evidence on the question of taint; and, secondly, Petitioner's counsel did indeed take issue with the representations of Government counsel. The transcript reflects the following:

> "MR. GREENBERG: All right. The next point, Your Honor, then, I understand -- well, there are two additional points that I think could be the subject of taint, Your Honor, that were touched upon in chambers.
>
> One, I understand that the Government has subpoenaed someone from the Department of Motor Vehicles for the purpose of showing that my client had a driver's license in the name of Charles Stein.
>
> My position on that would be, since the information that my client had a driver's license in that name came from the testimony of Agent --
>
> THE COURT: From the jacket, you mean.

"MR. GREENBERG: From the jacket in Apartment 212, subsequent to an unlawful entry, that the Government must show by clear and convincing evidence that the introduction of that evidence, the driver's license, is not tainted.

The other matter relates to the two addresses, Your Honor.

We have had reference to the Apartment 212 on Hatteras Street, and if I may direct the Court's attention now to 18366 Collins Avenue, you may recall, Your Honor, that after the officers' entry into Apartment 212, Mr. Ramsey indicated that he did not live at the Hatteras Street address, but lived around the corner at the Collins address, and he gave that address to them, gave the officers the key and accompanied, I think, Officer Apostolou there, and executed a consent to search for that apartment.

I now understand that the Government intends to introduce evidence from a postman that someone named Ramsey received mail at that address and I think, once again, that the Government must show by clear and convincing evidence that there is no taint, that they didn't get leads to that evidence from events that took place subsequent to the unlawful entry."
[RT 3-5] (Emphasis added.)

Thereafter, Government counsel did indeed make certain representations as to the Government's sources of information that allegedly lead to the challenged evidence. It should be noted at this point that both counsel were merely attempting to frame the issues for the Court. Even Government counsel was speaking in terms of mere proffers of evidence:

> "MR. LEVINE: . . .
> I mean, the Government can establish that there is an independent source for going to the Department of Motor Vehicles for any licenses in the name of Charles Stein."
> [RT 6] (Emphasis added.)

Following representations of Government counsel, Petitioner's counsel once again put the Court clearly on notice that: (1) Mere representations of Government counsel were not acceptable; and (2) counsel was not merely arguing the substance of the taint, but raising the procedural problem that the Government had not presented any evidence, and that Petitioner had not had an opportunity to examine it:

"MR. GREENBERG: . . . I think the one thing that might be significant, Your Honor, is when the Department of Motor Vehicles was subpoenaed for that driver's license.

I would suggest as well, as the Court has indicated, that the same inquiry should be made about the evidence over at the Collins Street address, because I think that would shed some light on it.

More significantly, statements and conclusions of counsel, although an officer of the court, are not evidence and, the prima facie illegality having been established here, my understanding is that the Government must now show by independent evidence, in a clear and convincing manner, that there is no taint.

So, I'm raising a procedural problem as well, Your Honor." [RT 8-9] (Emphasis added.)

Thus, the appellate court's conclusion that there was no request for a hearing, and that Government counsel's representations were not questioned, is simply incorrect in view of the proceedings below. Petitioner's counsel addressed the court on several occasions to the effect that the burden was on the Government to

demonstrate through "evidence" (not representations of counsel) the absence of taint. Further, he clearly put the court on notice that he was raising the procedural problem that the absence of taint must be demonstrated by evidence. That can mean nothing other than a "hearing" in which "evidence" -- as opposed to representations of counsel -- is presented.

B. Once the Illegality of A Search is Established, and the Defendant Offers Specific Evidence of Taint, the Burden Shifts to the Government to Demonstrate the Absence of Taint.

Petitioner does not take issue with the basic proposition relied upon by the Court of Appeals to the effect that the mere existence of an unconstitutional search does not render all evidence "sacred and inaccessible," relying upon United States v. Brock, 571 F.2d 480, 483 (9th Cir. 1978). However that is merely stating the obvious. The important question, which was not addressed by the appellate court, is where does the burden lie once a

primary illegality is established.

The probable taint was easily demonstrated by focusing on the driver's license. As the trial court acknowledged, the license seized from a jacket during the illegal search yielded a driver's license the Government contended was relevant. [RT 4] After it was suppressed, the Government promptly subpoenaed a new license from the Department of Motor Vehicles. The issue was clearly formed by a comment from the trial court:

> "THE COURT: What prompted you to go to the Department of Motor Vehicles is probably the crux of the issue.
>
> "MR. LEVINE: Normal investigative techniques . . . ."
> [RT 6]

Given the context in which the Government sought the license subsequently received in evidence (within a matter of hours after the trial court suppressed the other driver's license), it simply defies the imagination to believe that "normal investigative techniques" were responsible for receiving the second license. By definition,

since the trial was already in progress and the evidence marshalled, this eleventh hour subpoena could hardly be called "normal." It differs not in the slightest from practices long condemned in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), and Wong Sun v. United States, 371 U.S. 471 (1963).

Inadmissibility must rest upon a showing of possible causal connection between the search of the proffered evidence. Benetti v. United States, 97 F.2d 263 (9th Cir. 1938). The potential connection was clearly observed by the trial court. [RT 3-8] The problem is that the Government never presented evidence (as opposed to proffers of evidence) to resolve the question of taint. The error was thus both substantive and procedural. The procedural error was the failure to receive evidence to demonstrate the lack of taint, and to afford Petitioner an opportunity to examine that evidence; the substantive question was never really reached in view

of the procedural deficiency.

This Court always adhered to the basic rule that once a defendant has established an unconstitutional seizure, the burden then shifts to the Government to demonstrate that it acquired its evidence from an independent source, and that the proffered evidence is not tainted. As the Ninth Circuit has recently stated, in United States v. Cella, 568 F.2d 1266 (9th Cir. 1977), at pp. 1284-1285:

> ". . . As held by the Supreme Court and adopted by this circuit, the trial court must determine whether the prosecution used unconstitutionally seized material directly or indirectly to develop the evidence it produced at trial, or whether it obtained its trial evidence from an independent and untainted source. Alderman, supra, 394 U.S. at 183, 89 S.Ct. 961; United States v. Polizzi, 500 F.2d 856, 910 (9th Cir. 1974), cert.denied, 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975). Initially, the defendant who shows that he was the victim of an unconstitutional search must go forward with specific evidence demonstrating taint. Alderman, supra, 394 U.S. at 183, 95 S.Ct. 802; Nardone v.

"United States, 308 U.S. 338, 341, 60 S.Ct. 266, 85 L.Ed. 307 (1939). The burden then shifts to the government to show that it acquired its evidence from an independent source. Polizzi, supra, 500 F.2d at 910."
(Emphasis added.)

Thus, this Court is clearly committed to the proposition that given a primary showing of illegality (which was established in the case at bench), the burden then shifts to the Government to demonstrate and prove by evidence the absence of taint. It has been well-settled for years, that given a primary illegality, the defendant is entitled to an opportunity to explore in detail the circumstances under which the Government acquired the evidence at issue. In the words of the Supreme Court, the defendant must be permitted to attempt "to prove that a substantial portion of the case against him was a fruit of the poisonous tree." Nardone, supra, at 341.

The law is thus clear. The impact of the decision of the appellate court was twofold. First, it seems to impose upon the defendant some obligation

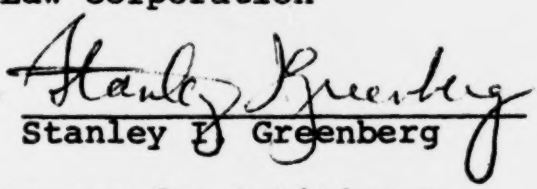
to request a "hearing" once the primary illegality has been established. Aside from the fact that defense counsel below clearly requested such an opportunity and was clearly denied one, that is not the state of the law. See cases, supra. Moreover, the court's decision seems to have completely eliminated the requirement that the Government must prove the absence of taint, and suggests that the Government's burden can be carried by mere representations of Government counsel that the challenged evidence was obtained by "normal investigative techniques." This conclusory statement offers absolutely no insight whatsoever into the factual background from which the challenged evidence came, and obviously flies directly in the face of this Court's decisions in Alderman and Nardone, supra.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

STANLEY I. GREENBERG,
A Law Corporation

By 
Stanley I. Greenberg

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APPENDIX A

FILED
December 17,
1979

RICHARD H. DEANE
Clerk,U.S.Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. SHERRON BASEY, Defendant-Appellant.	No. 78-1191
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. J. C. RAMSEY, Defendant-Appellant.	No. 78-1203 OPINION

Appeal from the United States District Court for the Central District of California

Before: ELY and TRASK, Circuit Judges, and EAST,* District Judge

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* Honorable William G. East, Senior United States District Judge, for the District of Oregon, sitting by designation.

TRASK, Circuit Judge:

Basey and Ramsey appeal their convictions in the United States District Court of conspiring to possess heroin with intent to distribute in violation of 21 U.S.C. §846 (Count I) and of distributing and possessing with intent to distribute one-half kilogram of heroin on or about March 9, 1977, in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(B) (Count II). The case was tried to the court sitting without a jury and each defendant was convicted of both counts. The defendants were sentenced to concurrent terms. Their separate appeals were consolidated.

Appellants challenge the sufficiency of the evidence sustaining their convictions and contend that a voice identification of Ramsey violated due process, that a chemist's testimony was inadmissible because the evidence was tampered with, and that admission of Ramsey's California driver's license, issued under an alias, was "fruit of the poisonous tree."

We find no merit in these contentions and affirm the convictions.

Appellants' convictions are based upon a series of drug transactions involving appellants and three other principle parties, Bruno, Williams, and Henderson. Bruno, a New York police officer working undercover, contacted Williams in New York with regard to the possibility of purchasing some heroin. Williams discussed the matter with Henderson who later called from Los Angeles to inform Williams that he had a contact who could supply the heroin. Williams flew to Los Angeles where he met Henderson and was taken to meet appellant Basey. Basey gave Williams a "free sample" of brown rock heroin and said she could supply whatever Williams needed. Later, Williams gave Henderson $10,000 to buy some heroin from Basey. Henderson made the purchase. Basey, Henderson, and Williams then met at a restaurant to toast their new venture. Williams mixed the sample Basey had given him with an equal amount of the purchased

heroin, returned to New York, and gave Officer Bruno the mixture.

Thereafter, Williams twice traveled to Los Angeles and made similar purchases. On both occasions, he met Henderson in the latter's apartment. Henderson would call Basey, take Williams' money, and return a few hours later with the drugs.

In February 1977, Bruno, in New York, negotiated with Henderson, in Los Angeles, for a large 1-1/2 kilo purchase. Henderson later told Bruno, in a call recorded by Bruno, that he had a contact for the heroin and would come to New York to close the deal. Williams met Henderson at the airport and they both met with Bruno. Henderson told Williams that he had met Basey's connection so he would no longer have to make purchases through her. The three negotiated an additional purchase. On March 9, 1977, while in New York to deliver 1/2 kilo of heroin to Bruno, Henderson was arrested. He agreed to cooperate with the government and to record future

telephone conversations with his heroin source. The next day, Henderson called his source, appellant Ramsey. Henderson told Ramsey that he and Bruno would come to Los Angeles to close the large 1-1/2 kilo deal which was still pending. Bruno was introduced to Ramsey over the phone and Ramsey identified himself by his nickname, "Snake." Bruno and Henderson together with other federal agents, returned to Los Angeles. After some negotiations with Ramsey, the big deal fell through and Ramsey was arrested.

Appellants first challenge the sufficiency of the evidence, Ramsey as to Count I and Basey as to both counts. In examining the evidence, the standard we must apply is whether there is substantial evidence, taken in the light most favorable to the government, supporting the convictions. Glasser v. United States, 315 U.S. 60, 80 (1942).

Ramsey attacks the sufficiency of the evidence on two principle grounds. First, he contends that there was insufficient evidence identifying him as the individual named

"Snake" who was Henderson's source and who participated in several recorded telephone negotiations with Henderson and Bruno. A number of witnesses testified that Ramsey was known as "Snake." A DEA agent identified Ramsey's voice from the recorded conversations. The government also introduced telephone registers indicating increased telephone activity between Ramsey, Basey and Henderson during the time of the sales. Voice identification may be accomplished by direct or circumstantial evidence. United States v. Turner, 528 F.2d 143, 163 (9th Cir.), cert. denied, 423 U.S. 996 (1975) and 429 U.S. 837 (1976). We find that there was sufficient evidence establishing Ramsey's identity.

Second, Ramsey asserts that the trial judge erred by receiving evidence of Ramsey's participation in the conspiracy before Ramsey's identification was established. The order in which this evidence comes in, subject to a motion to strike, is well within the trial court's discretion. Its exercise of that discretion will only be

reversed in the event of clear abuse. United States v. Weiner, 578 F.2d 757, 768 (9th Cir.), cert. denied, 439 U.S. 981 (1978). There was no abuse of discretion in this case. Ramsey's challenge to the sufficiency of the evidence is without merit.

In challenging the sufficiency of the evidence supporting her convictions, Basey first asserts that there was nothing other than co-conspirator testimony to prove that she was a part of the conspiracy. The government, however, supported co-conspirator testimony of her participation with evidence of increased telephone activity during the time of the various sales,[1/]

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1. We find no error in the admission of Basey's college records to establish her address. A sufficient custodian testified that the records were made and kept in the regular course of college business. It is unimportant under Fed.R.Evid. 803(6) that the custodian did not herself record the information or know who recorded the information. See e.g., United States v. Reese, 568 F.2d 1246, 1252 (6th Cir. 1977); United States v. Jones, 554 F. 2d 251, 252 (5th Cir.), cert. denied, 434 U.S. 866 (1977). --(Cont'd on B-8)

and with evidence of her conversation with Williams during which they discussed future transactions which did eventually take place. In addition, this court has held that even uncorroborated accomplice testimony is "sufficient evidence upon which to base a conviction if the testimony is not incredible or unsubstantial on its face." United States v. Sigal, 572 F. 2d 1320, 1324 (9th Cir. 1978). There was substantial evidence to support Basey's conviction of Count I.

Basey challenges her conviction of Count II on the ground that there was no evidence of her continued involvement in the conspiracy on March 9, 1977, when the transaction upon which that charge is based occurred. Under the concurrent sentence doctrine

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(Cont'd from B-7) In this case, the "person with knowledge" required by the rule would, of course, be Basey herself. No double hearsay problem arises, therefore, as admissions and adoptive admissions are not hearsay under Fed.R.Evid. 801(d)(2). The court did not abuse its discretion by admitting the records.

of Benton v. Maryland, 395 U.S. 784, 791 (1969), which this court follows, see United States v. Walls, 577 F.2d 690, 699 (9th Cir.), cert. denied, 439 U.S. 893 (1978), we need not reach appellant's arguments on this count if her conviction of the first count is valid. Basey, however, can be convicted of the substantive acts of her co-conspirators whether or not she directly participates in those acts. United States v. Testa, 548 F.2d 847, 855 (9th Cir. 1977). Her participation in the conspiracy is presumed to continue until the last overt act of the conspirators unless she produces affirmative evidence of withdrawal. United States v. Panebianco, 543 F.2d 447, 453 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977). Basey produced no such affirmative evidence. Consequently, her conviction of Count II was proper in any event.

Ramsey next contends that the procedure leading to DEA agent Smith's voice identification of him was so impermissibly suggestive as to violate due process. Use of agent Smith's

testimony became necessary when testimony from other potential identification witnesses was suppressed shortly before trial. In addition, although somewhat suggestive, [2] the identification procedure employed was not so suggestive that "the mental image derived from the witness's own experience." United States v. Kim, 577 F.2d 473, 483 (9th Cir. 1978), quoting United States v. Pheaster, 544 F.2d 353, 370-71 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977). Thus the requirements of voice identification were met. See United States v. Pheaster, supra at

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2. Agent Smith was asked to listen to tapes and identify any voices he heard. He was not asked if he knew Ramsey before he heard the tapes or if he could identify Ramsey's voice. In this regard, the situation conforms with the recommendations of this court in United States v. Pheaster, 544 F.2d 353, 370 (9th Cir. 1976), cert. denied 429 U.S. 1099 (1977). He was aware, however, that the tapes he was listening to were to be evidence in the Ramsey and Basey trial and that it was likely that one of the defendant's voices would be on the tapes. He also knew that "Snake," a name used on the tapes, was a nickname for Ramsey.

369-71. [3]

Both appellants assign error to the admission into evidence of a stipulated chemist's report. The report concluded that the substance given to Williams by Basey as a "sample," and subsequently delivered to Officer Bruno, was heroin. Williams testified that he mixed the sample with an equal amount of the substance purchased from Basey with Henderson serving as an intermediary.

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3. Ramsey contends that agent Smith's testimony was impeached during cross-examination, thereby demonstrating the unreliability of his identification. Smith, however, testified that he had several conversations with Ramsey including one lasting 30 minutes when Ramsey was arraigned just seven months prior to trial. He testified that he was able to recognize Ramsey's voice after listening to the tape for only 15 to 20 seconds. He also testified as to several characteristics of Ramsey's voice which he noticed in making his identification. He listened to additional tapes and identified one of the conversants as Ramsey. Thus, there was substantial evidence from which the district court could conclude that Smith's identification was reliable.

Appellants contend that this mixing resulted in an alteration of the evidence in violation of the rule of United States v. Godoy, 528 F.2d 281 (9th Cir. 1975), and Gallego v. United States, 276 F.2d 914 (9th Cir. 1960). Appellants' reliance upon these cases is misplaced. Godoy and Gallego require that the government prove no alteration or tampering with the evidence after the government obtains custody of it. Any alteration which occurred in this case was done by a co-conspirator before the government obtained custody. The district court did not abuse its discretion by admitting the evidence.

Finally, Ramsey contends that the government should not have been permitted to introduce his driver's license on the ground that it was "fruit of the poisonous tree." 4/

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4. Ramsey also objects to admission of the license on relevancy grounds. The license was issued in the name of "Charles Stein," had Ramsey's picture, and was dated three months after the end of the conspiracy. Ramsey contends that the license reflected current facts only, not -- (Cont'd on A-13

Prior to trial, all evidence resulting from Ramsey's arrest and subsequent search, including his driver's license, was suppressed. Thereafter, the prosecutor subpoenaed a copy of Ramsey's license from the California Department of Motor Vehicles, which was introduced at trial as identification evidence.

As this court stated in United States v. Brock, 571 F.2d 480, 483 (9th Cir. 1978), "information obtained through an unconstitutional search does not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . .' Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)." In response to inquiries by the district court, the Assistant U.S. Attorney stated that the license was obtained

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(Cont'd from A-12) facts existing during the conspiracy. The license, however, was submitted on the issue of identification and was clearly relevant to demonstrate Ramsey's use of the alias "Charles Stein." Admission into evidence was not an abuse of the district court's discretion.

through normal investigative techniques and that all information necessary to subpoena it was known prior to the illegal search and seizure. Therefore, we hold that the license was not suppressable as "fruit of the poisonous tree." 5/

The convictions of both appellants were supported by substantial evidence on both counts. The district court committed no error by admitting into evidence agent Smith's voice identification of appellant Ramsey, the chemist's report, or appellant Ramsey's driver's license. The convictions are AFFIRMED.

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5. Ramsey now questions the district court's failure to hold a hearing on the issue of independent source. However, he requested no hearing below, and the government's representations that the source was independent were never even questioned.

APPENDIX B

FILED
March 10, 1980

RICHARD H. DEANE
Clerk, U.S.Court
of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No.78-1203
J.C. RAMSEY, Defendant-Appellant.	)	O R D E R

Before: ELY and TRASK, Circuit Judges, and EAST,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and recommends the rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has

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* Honorable William G. East, Senior United States District Judge, for the District of Oregon, sitting by designation.

requested a vote on the suggestion for rehearing en banc. Fed.R.App.P.35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.